Supreme Court, U.S.
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No. 96-884

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

MITSUE TAKAHASHI

Petitioner,

v.

LIVINGSTON UNION SCHOOL DISTRICT
and HENRY ESCOBAR,

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondents Livingston Union School District and Henry Escobar object to the questions presented in Petitioner's petition for writ of certiorari because they do not accurately reflect the issues raised by this action. Respondents present the question for review as follows:

Did the California Court of Appeal err in affirming summary judgment in favor of Respondents in the underlying discrimination lawsuit when the evidence showed that Respondents refused to consider Petitioner for a teaching position ten years after Respondents successfully terminated her employment for incompetency?

PARTIES TO THE PROCEEDING

The Petitioner is Mitsue Takahashi, a former teacher with Respondent, Livingston Union School District, who was terminated for incompetency after an adjudicatory proceeding in 1980. Respondents are Livingston Union School District, a California public school district, and Henry Escobar, Assistant Superintendent of Livingston Union School District at the time the lawsuit was filed.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Livingston Union School District and Henry Escobar respectfully submit this brief in opposition to Petitioner's petition for writ of certiorari to review the decision of the Court of Appeal of the State of California in and for the Fifth Appellate District, entered May 13, 1996.

STATUTORY PROVISIONS INVOLVED

Respondents agree that Petitioner's underlying lawsuit alleges a violation of Title VII, 42 U.S.C. section 2000e.

The Civil Rights Act of 1971, 42 U.S.C. section 1983 was cited in the complaint but was never raised at any stage of these proceedings and is not at issue here. Similarly, this case was not adjudicated pursuant to Federal Rules of Civil Procedure, Rule 56. The California Court of Appeal ruling at issue here was determined pursuant to California Code of Civil Procedure section 437c, the State of California summary judgment statute, not Rule 56.

RESPONDENTS' STATEMENT OF THE CASE

A. Termination For Incompetency

In 1980, Petitioner Mitsue Takahashi was lawfully dismissed from her teaching position with the Livingston Union School District ("District") for incompetency. For that reason, when Petitioner applied for another teaching position with the District in 1991, the District did not consider her application. Petitioner thereupon filed a claim for race, age, and sex discrimination. Respondents Livingston Union School

District and Henry Escobar moved for summary judgment and dismissal, which the trial court granted, the state appellate court affirmed, and the California Supreme Court refused to consider for review.

Petitioner has waged continuous litigation against the District since her 1980 termination. Three separate published court decisions have upheld the District's actions. Now a fourth appellate court, this time in an unpublished-decision, has ruled against Petitioner in yet another lawsuit relying on events harking back to the 1980 termination. This is the fourth time this Petitioner has petitioned for United States Supreme Court review of a ruling in the District's favor related to her 1980 termination. This petition is no more meritorious than the other three and should be denied.

The petition for certiorari does not raise any proper ground for review, but simply takes issue with the appellate court decision. This is a run-of-the-mill discrimination case, decided on summary judgment, applying a well-settled rule to a particular set of facts: absent evidence that the District's nondiscriminatory explanation for not hiring Petitioner was a pretext for unlawful discrimination, summary judgment is properly granted. Respondents respectfully urge this Court to deny the petition for review.

B. Procedural History

On June 25, 1993, Petitioner filed a complaint charging Respondents with age, race, and sex discrimination in violation of the California Fair Employment and Housing Act (Gov. Code, § 12900 et seq.) and Title VII of the Federal Civil Rights Act. (42 U.S.C. § 2000e et seq.)

On August 8, 1994, the court granted Respondents' motion for summary judgment, ruling (1) that Petitioner was not qualified for the position for which she applied, (2) that Petitioner presented no evidence that Respondents' legitimate and nondiscriminatory reasons for not considering Petitioner's application for employment was a pretext for discrimination, and (3) that there was no triable issue of any material fact with regard to either of the above issues. (See Superior Court of California, County of Merced Order for Entry of Summary Judgment, Appendix D, pp. 44a - 45a.)

The Court of Appeal for the Fifth Appellate District of California affirmed the trial court's decision. In its decision, the court of appeal held that even assuming Petitioner had established a minimal prima facie case of discrimination, Petitioner did not produce specific, substantial evidence that Respondents' nondiscriminatory reasons for not hiring her were a pretext for discrimination. The court held that the District refused to consider Petitioner for employment for two reasons: (1) the District had previously terminated Petitioner from the same position for incompetency in 1980; and (2) the successful candidate had superior bilingual qualifications. (Opinion, Appendix B, p. 28a.) The evidence excluded by the trial court was in the record. The appellate court considered that evidence in its decision, and held that the exclusion was not error, and, even if error, was not prejudicial because the evidence offered did not show pretext. (Opinion, Appendix B, pp. 31a - 40a.)

The decision at issue here is the latest chapter in Petitioner's long history of unmeritorious employment litigation against the District. Petitioner was a junior high school math and science teacher in the District prior to 1980. In November 1980, an administrative hearing before a California Commission on Professional Competence convened

pursuant to California Education Code section 44944 resulted in a finding that cause to dismiss for incompetency had been established. *California Teachers Assn.* v. *Governing Board,* 144 Cal.App.3d 27, 31 (1983), hereafter referred to as "*Takahashi I.*" On review by petition, the superior court, exercising independent judgment on the evidence pursuant to Education Code section 44945, found cause for dismissal for incompetency. In 1983, the Court of Appeal for the Fifth Appellate District found sufficient evidence to support that decision. *Takahashi I,* 37-38. The California Supreme Court denied Petitioner's petition for review (*Id.* at 38), and the United States Supreme Court denied her petition for a writ of certiorari. *Takahashi* v. *Governing Board,* 465 U.S. 1008, 79 L.Ed.2d 235, 104 S.Ct. 1003 (1984).

Petitioner then filed an action in federal court, alleging constitutional and civil rights violations arising out of her termination. *Takahashi* v. *Bd. of Trustees of Livingston,* 783 F.2d 848, 849 (9th Cir. 1986), hereafter referred to as "*Takahashi II*". The district court granted the District's motion for summary judgment and dismissed the case on the ground that the action was barred by res judicata. (*Ibid.*) The United States Court of Appeal for the Ninth Circuit affirmed that holding in *Takahashi II,* and again the United States Supreme Court denied certiorari. *Takahashi* v. *Bd. of Trustees of Livingston,* 476 U.S. 1182, 91 L.Ed.2d 545, 106 S.Ct. 2916 (1986).

Separate complaints in the superior court alleging common law and civil rights causes of actions were consolidated, and summary judgment was again granted on the basis of res judicata. *Takahashi* v. *Board of Education,* 202 Cal.App.3d 1464, 1471-1473 (1988), hereafter referred to as "*Takahashi III.*" The Court of Appeal affirmed, ruling that the

action was barred by res judicata with regard to both the final administrative and trial court judgments reviewed in *Takahashi I* and the decision with regard to the application of res judicata in *Takahashi II*. See generally, *Takahashi III*. Again, both the California Supreme Court (*Id.*, at 1486) and the United States Supreme Court denied review. *Takahashi* v. *Board of Education*, 490 U.S. 1011, 104 L.Ed.2d 168, 109 S.Ct. 1654 (1989).

CORRECTIONS OF INACCURACIES IN PETITIONER'S STATEMENT OF THE CASE

Petitioner's Statement of the Case rests heavily upon her claim that she was qualified for the Livingston School District teaching position for which she applied in 1991. She appears to believe that if she can convince any court at any level that she was qualified to teach in Livingston, the summary judgment will be reversed. As discussed below, Petitioner's qualification for a teaching credential is not at issue. Whether or not Petitioner was qualified to teach in places other than Livingston, Respondents did not consider her for employment in 1991 because she had been fired from their district for incompetency. Petitioner offered no evidence that Respondents' justifiable reason for its decision was a pretext and thus the court granted Respondents' motion for summary judgment.

Despite Respondents' unassailable legal position, it is important to correct misstatements of fact in Petitioner's Statement of the Case, all of which focus on Petitioner's claim that she was qualified for the teaching job.

A. The California Committee of Credentials Made No Finding On Petitioner's Competency

Petitioner makes the following erroneous statement on page 8 of her petition: "On or about February 19, 1985, a Committee of Credentials of the State Commission On Teaching Credentialing issued a determination that no probable cause existed for the charge of incompetence and continued to uphold Takahashi's life teaching credentials despite the dismissal for incompetence."

The accurate statement, cited in the court of appeal's opinion on page 10a of Appendix B, is as follows: "On or about February 19, 1985, the Committee of Credentials of the State Commission on Teacher Credentialing (Committee) determined **no probable cause existed for the suspension or revocation of plaintiff's teaching credentials.**"

The Committee of Credentials made no determination whatsoever as to whether probable cause existed for the charge of incompetence. As the court explained at length in in its opinion, the distinction between teacher dismissal and license revocation proceedings is well recognized. The 1980 dismissal proceeding before the Commission on Professional Competence ruled that in Livingston Union School District, Petitioner was an incompetent teacher. That ruling had no effect on Petitioner's right to continue to be licensed to teach. She just could not teach in Livingston. Petitioner's misstatement of the facts, which are stated correctly in the court's opinion, is disingenuous. (For a full discussion of the difference between the dismissal proceedings and the licensing proceedings, see Court of Appeal Opinion, Appendix B, pp. 25a through 27a.)

B. Oscar Pena Had Proper Teaching Credentials

Petitioner also misstates the facts on page 9 of her petition where she states that "Pena held no teaching credentials."

Oscar Pena was the teacher hired in 1991 to hold the science position for which Petitioner applied. Although he had not completed all the requirements for a permanent credential at that time, the record shows that he was appropriately credentialed under California law for teaching science at Livingston Union School District in 1991.

C. Oscar Pena Was A Top Bilingual College Graduate

Petitioner makes a misleading statement regarding Oscar Pena's college education on page 10 of her petition where she states that, "Pena did not hold a four-year college degree . . . at the time he made his application."

Although it is technically correct that Mr. Pena was completing his final year of college at the time of his application, the statement misleads the Court. In fact, Oscar Pena was "the top bilingual graduate from Fresno Pacific [College] in 1991" and began his teaching assignment with Livingston after graduation. (Opinion of the Court of Appeal, Appendix B, p. 29a.)

D. Petitioner Had A Full Evidentiary Hearing On Competency In 1980

Petitioner's statement on page 11 of her petition that she "never received a trial on the issue of her competence in 1980"

is contradicted by the lengthy string of citations which make up her litigation history. To repeat, she was tried before a three-member Commission on Professional Competence, pursuant to Education Code section 44944, in 1980 and was found incompetent. The trial court made the same ruling after an independent review of the evidence. *Takahashi I.* Petitioner has obviously never accepted that decision, but she had her trial.

ARGUMENT

I. SUMMARY OF ARGUMENT

Petitioner filed her race, age, and sex discrimination lawsuit soon after Respondents rejected her 1991 application for a teaching job. To prove her claim, Petitioner was required to show that she was qualified for the position and that any legitimate, nondiscriminatory explanation offered by Respondents was merely a pretext. Respondents successfully moved for summary judgment against Petitioner because they were able to establish conclusively a legitimate, nondiscriminatory reason for their actions, such that no triable issue of fact remained.

Respondents never considered Petitioner's application for employment in 1991 because Petitioner had been terminated from a teaching position with the Livingston School District for incompetency in 1980. Pursuant to the extensive and detailed procedural protections set forth in the California Education Code for this kind of termination, a Commission on Professional Competence had been duly convened, and had determined that Petitioner should be terminated for incompetency. On mandamus review, the California superior court, exercising independent judgment of the evidence, also

determined that Petitioner should be terminated for incompetency. This decision was upheld on appeal, and both the State and the United States Supreme Courts denied review.

Petitioner is manifestly not qualified to be a teacher in Livingston. No fewer than three separate appellate opinions have upheld the school district's determination in 1980, and the independent conclusion of the trial court, that she be terminated. Petitioner is collaterally estopped by those decisions from relitigating the issue of her incompetence as a teacher for Livingston. Since she has been determined incompetent as a Livingston teacher, she cannot make a prima facie case of discrimination under *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973).

Moreover, even were Petitioner qualified for the position, the District had a justifiable, nondiscriminatory reason for its action. Surely a public school district is not required to hire back the teachers it has fired for incompetency. Petitioner was unable to produce any evidence whatsoever that this reason was mere pretext. Her one stab[1/] at a showing of discrimination was a statement allegedly made by the former superintendent of Livingston ten years before Petitioner's 1991 application that Japanese people are "quiet" and "non-assertive." Both the trial court and the Court of Appeal rejected this evidence as too remote and lacking any nexus with the 1991 hiring decision.

[1/]Petitioner also tried to argue that Henry Escobar's alleged statement to Petitioner at the 1991 job fair that there were no jobs proved discrimination. The court of appeal correctly ruled that the alleged statement, even if true, did not constitute specific, substantial evidence of pretext. (Opinion, App. B, pp. 30a - 31a.)

Summary judgment was properly granted and affirmed. This case does not merit United States Supreme Court consideration.

II. THIS CASE PRESENTS NO BASIS FOR SUPREME COURT REVIEW

The United States Supreme Court accepts for review only cases involving important federal questions with broad public policy implications. This case does not begin to meet that test. The decision merely reiterates established state and federal discrimination law that, absent evidence that an employer's non-discriminatory explanation for not hiring an employee was a pretext for unlawful discrimination, summary judgment is properly granted.

Rule 10 of the Rules of the Supreme Court of the United States sets forth specific reasons for which the Court will grant certiorari. None of the Rule 10 reasons applies here.

The petition in this case challenges a state court decision, not a decision of the United States Court of Appeals. The California Supreme Court, the state court of last resort, refused to consider this case. The state court of appeal made no decision on an important federal question that conflicts with decisions of other state courts of last resort or a United States court of appeals. On the contrary, the California court of appeal in this case expressly followed the ruling of two federal court cases, *Wilson* v. *McDaniel,* 54 Fair Empl. Prac.Cas. (BNA) 1499, 57 Empl.Prac.Dec., (CCH Para. 11, 222) (M.D.N.C. 1991), *aff'd,* 935 F.2d 1284 (4th Cir. 1991) and *Mira* v. *Monroe County School Bd.*, 687 F.Supp. 1538 (S.D.Fla. 1988).

The decision of the court of appeal in this case is in no way an important question of federal law that should be settled by this Court. It is instead a run of the mill discrimination lawsuit decided appropriately on summary judgment.

III. PETITIONER'S ARGUMENTS IN HER PETITION HAVE NO VALIDITY

Petitioner first argues that "direct evidence of discrimination practiced against Americans of Japanese descent by public school officials defeats summary judgment."

In fact, this argument requires a stretch back in time to a chance remark made ten years prior to Respondents' 1991 rejection of Petitioner's employment application. This is the best Petitioner could do to show discrimination and the court properly ruled the remark lacked nexus. The only mention in the record of Japanese Americans by any of the school district employees at any time was an alleged remark by former Superintendent Harold Thompson in 1982 to Antonio Aguilar, Senior Consultant of the Department of Fair Employment and Housing's Fresno office, that Japanese people tend to be "quiet" and "not assertive." As the court of appeal correctly determined, there was no nexus established by Petitioner between that alleged 1982 statement and the decision by Henry Escobar in 1991 not to hire Petitioner as a teacher with the District.

In 1983, the California court of appeal found sufficient evidence to support the District's 1980 termination of Petitioner's employment for cause. *California Teachers Association* v. *Governing Board*, 144 Cal.App.3d 27, 37-38 (1983). *Takahahi I.* . In 1988, the California Court of Appeal held that the final judgment in the 1983 action was res judicata

as to all issues that were or could have been litigated in that action. *Takahashi* v. *Board of Education,* 202 Cal.App. 3d 1464, 1471-1473 (1988). *Takahaski III.* Therefore, in neither her 1988 action nor her 1993 action could Petitioner use the alleged remark by Harold Thompson to argue that her original 1980 termination was the result of discrimination.

To use the 1982 alleged statement as a demonstration of discrimination in 1991, Petitioner had to show a nexus between Thompson's alleged statement and Henry Escobar's 1991 decision not to consider the plaintiff's application. The court of appeal correctly concluded that nothing in the record suggested such a nexus. Even if Petitioner could prove Thompson was biased against her in 1982, she did not make any "proffer of evidence which reaches beyond speculation and conjecture to show a connection with the District's decision not to consider her 1991 application for employment." (Opinion, Appendix B, pp. 30a - 31a, 34a - 36a.)

Petitioner's second argument in petitioning this Court for review is that the state court of appeal erred in finding she was not qualified for the position and thus could not state a *prima facie* case of discrimination. Such an argument misstates the court of appeal's decision. The trial court did indeed rule that Petitioner was not qualified for the position because she had previously been terminated from the position by the District for incompetency, and therefore, she could not establish a *prima facie* case. The appellate court, however, did not so rule. Although the appellate court's discussion was favorable to a finding that Petitioner was not qualified, the Court did not reach that conclusion explicitly. Rather, the Court stated as follows:

> The degree of proof necessary to establish a *prima facie* case for Title VII claims on summary judgment is minimal and does not need to rise to the level of preponderance of the evidence. However, even assuming *arguendo* that plaintiff has produced the minimum evidence necessary to establish a *prima facie* case, this does not preclude summary judgment here. . . . When evidence to refute the defendants' legitimate explanation is totally lacking, summary judgment is appropriate, even though plaintiff may have established a minimal *prima facie* case.

(Opinion, Appendix B, pp. 27a, 28a.)

The decision at issue here was based on the lack of evidence of pretext, not on the failure to establish a *prima facie* case. Thus, even if a court were to rule that Petitioner was qualified for the job, summary judgment would still be granted in favor of Respondents because of Petitioner's complete failure to produce evidence that the District's reason for not hiring her in 1991 was discriminatory. In fact, the District quite understandably did not want to put back into the classroom a teacher they had fired for incompetency. If there is any public policy issue raised by this case, that is it.

Petitioner's third argument is that bilingual ability was not a requirement for the advertised position. She makes this argument because the court of appeal found that the District refused to consider Petitioner's application in 1991 for two reasons: (1) the District had previously fired her; and (2) the District was under a state court order to hire more Spanish

speaking teachers for their growing Spanish speaking student population. (Opinion, Appendix B, p. 28a.)

Whether or not bilingual ability was an absolute requirement for the job, the undisputed facts demonstrate that the District had a shortage of qualified Spanish bilingual teachers to meet the needs of the increasing number of Spanish speaking students in the District, and the State had ordered the District to create a plan to remedy this shortage. Oscar Pena, the successful candidate for the 1991 science position was a Mexican-American with Spanish as his first language. Petitioner admitted at deposition that she did not consider herself conversant in Spanish. (Opinion, Appendix B, pp. 12a - 13a, 29a.)

The court therefore correctly concluded that the District's choice of Mr. Pena over Petitioner was justified and non-discriminatory. Petitioner was able to produce no evidence showing that this rationale for the decision was a pretext. (See Opinion, Appendix B, p. 28a through 31a.)

Finally, Petitioner argues that public policy dictates that she should receive a trial on the merits "to insure the integrity of a state-issued license, job tenure rights, the education of the nation's children and equal employment opportunity."

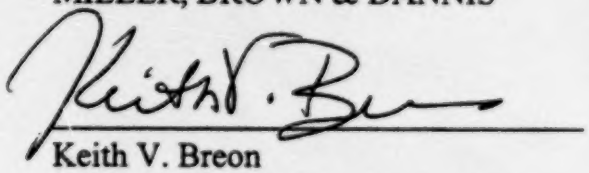
Respondents agree only that public policy is at issue here. The overwhelming public policy is that public school districts, so severely criticized in the past several decades for not attaining their goals of educating the nation's children, should never, ever be required to rehire teachers who have been determined, after an evidentiary trial, to be incompetent.

Petitioner has exhausted the resources of public education and the court system for 16 years. This is the fourth appeal to the United States Supreme Court. This Court has no choice but to deny certiorari in this case.

Dated: December 20, 1996

Respectfully submitted,

BREON, O'DONNELL
MILLER, BROWN & DANNIS



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